86-828

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTHWESTERN SHEET METAL WORKS, INC.,
Petitioner,

v.

SEMCO MANUFACTURING, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether a local labor union which secretly aligns itself with a manufacturer and intentionally excludes the manufacturer's competitor causes cognizable "antitrust injury" when it grants a favorable wage rate to the manufacturer and withholds it from the competitor, thereby unlawfully bestowing an exclusive anti-competitive cost advantage on the manufacturer, and when the competitor, Petitioner herein, adduces the following evidence of its loss:

a. That Respondent entered into a secret pre-hire agreement with a local labor union to unlawfully confer uniquely favorable union wage rates upon Respondent intending thereby to place Petitioner at a competitive disadvantage;

b. That Respondent thereafter used its unique, anticompetitive wage advantage to structure its bids on certain construction projects;

c. That the only two manufacturers of spiral pipe and fittings that bid based on labor costs in the pertinent union jurisdiction were Petitioner and Respondent;

d. That throughout the period that Respondent bid with the unlawful union wage advantage it was in direct competition with Petitioner for construction projects nationwide;

e. That Petitioner's bids on numerous identified construction projects would have been lower than Respondent's bids but for the unlawful advantage;

f. That the record did not contain evidence establishing that third party bidders existed on all such projects, the amount of such third party bids, or their competitive position relative to Petitioner and Respondent; and

g. That Petitioner suffered substantial economic loss to its business during the period that Respondent bid with the unlawful union wage advantage, including (i) a loss of construction projects; (ii) a dramatic reduction in its backlog of bid orders; (iii) a sharply reduced profit margin on projects for which it bid, including those it actually received; (iv) its salesmen experiencing a startling adverse reaction to the company's bidding opportunities and success rate; and (v) its inability to negotiate freely for a beneficial labor contract.

2. Whether the Fifth Circuit's requirement that a private antitrust plaintiff foreclose all alternative potential causes, or disprove intervening or supervening sources, of its damage in establishing injury under Section 4 of the Clayton Act constitutes such an extreme and unwarranted elevation of the previously recognized burden of proof in antitrust cases that it threatens to reduce private enforcement of the antitrust laws to a near nullity.

LIST OF PARTIES AND OTHER INTERESTED PERSONS

The parties to the proceedings below were the Petitioner Southwestern Sheet Metal Works, Inc., the Respondent Semco Manufacturing, Inc., and Henry V. Mesa. Mesa, co-defendant in the U.S. District Court action, was not a party to the Fifth Circuit appeal, and is not before the Court as a party to these proceedings.

The following persons and entities not listed in the caption have an interest in the outcome of these proceedings. These representations are made for purposes of consideration in evaluating possible disqualification or recusal.

Henry V. Mesa, Defendant (Non-Appealing).

Limbach Corporation, Parent of Semco Manufacturing, Inc.

International Sheet Metal Workers Union.

Local 49 of the International Sheet Metal Workers Union.

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SEMCO MANUFACTURING, INC.,
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The Petitioner, Southwestern Sheet Metal Works, Inc. ("Southwestern") respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit filed May 5, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix 3) is reported at 788 F.2d 1144. The District Court did not issue a formal opinion. The District Court's Judgment, Order, and Jury Verdicts are set forth at Appendices 4-7, respectively.

JURISDICTION

The judgment of the Court of Appeals (Appendix 1) was entered on May 5, 1986 and the Fifth Circuit's denial of Southwestern's Petition for Rehearing En Banc was entered on August 25, 1986 (Appendix 2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1966), Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), and Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976).

STATUTES INVOLVED

The statutory authorities involved in this Petition are set forth in full text at Appendices 8 and 9.

STATEMENT OF CASE

This dispute involving a restraint of free trade originated between two union employers that manufacture spiral pipe and duct fittings, and centered around their respective relationships with Sheet Metal Workers Union Local 188 (the "Local"): (1) Southwestern Sheet Metal Works, Inc. ("Southwestern"), the Petitioner herein, and (2) Semco Manufacturing, Inc. ("Semco"), the Respondent herein.

At all material times, Southwestern and Semco directly competed for construction projects throughout the United States. Southwestern's cause of action charged a violation of Section 1 of the Sherman Act arising out of a secret labor agreement entered in 1981 between Semco and Henry V. Mesa ("Mesa"), who was then the union representative for the Local. Semco and Mesa secretly agreed to set wage rates Semco would pay for union labor in a manufacturing plant Semco proposed to build in Sunland Park, Texas. The new agreement permitted Semco to use production workers, the lowest paid union workers, in the fabrication of spiral pipe and fittings. The Local previously prohibited the use of these workers on any spiral pipe construction jobs. At the time, Semco had no existing facilities or workers in the Local's

jurisdiction, which covers sheet metal workers in the El Paso/Southeastern New Mexico area. Only two spiral pipe and duct fittings manufacturers, Southwestern and Semco, operated or bid out of plants in that area during the period applicable to Southwestern's claim.

Semco and Mesa, through deliberate acts of secrecy, kept the terms of their agreement hidden from the Local, the national Union and Southwestern. Southwestern had no opportunity to negotiate for similar wage terms, because neither Semco nor Mesa would admit to the existence of the wage agreement. Even after Semco began bidding out of Sunland Park using the secret wage rates, moreover, Semco and Mesa consistently denied having entered into any agreement.

The record showed that Semco knew the clandestine agreement was an unlawful pre-hire agreement which local workers had not seen, much less formally approved. Its secrecy was a veiled attempt to jeopardize Southwestern's competitiveness.

Semco thereafter used its secret and exclusive union wage terms to calculate its bids on construction projects nationwide. Southwestern competed directly with Semco on approximately 90% of these projects. The secret and unique wage advantage reduced Semco's bids substantially. Therefore, Semco's conduct in the marketplace had a direct effect on and in fact targeted Southwestern, causing it business loss through artificial impairment of its ability to compete.

Semco bid and thereafter received jobs for some nine months by exclusively using the wage benefit of production worker's rates.

At trial, Southwestern offered evidence of antitrust injury of exactly the type likely to be caused by the defendants' conspiracy. During the period of disparity, Southwestern attempted to compete with Semco on a large number of construction jobs. Almost immediately, although it had no knowledge of the production workers agreement or Semco's bidding advantage,

Southwestern experienced an unprecedented competitive disadvantage. Contemporaneously, Southwestern's business fortunes reflected its injury: it experienced extreme difficulty in obtaining bids; its sales staff reported a decline in bidding opportunities; its customers developed a perception that Southwestern was no longer competitive; its bidding success fell dramatically; and consequently its backlog of awarded bids dropped and was ultimately nearly eliminated.

Price is the major factor in determining bid awards, and Semco used a 20% lower wage rate to calculate its bids. When Semco bid with its exclusive union wage agreement, Southwestern's bids were some 20% higher than Semco's bids. Moreover, when Southwestern realized it was no longer competitive, it changed its bidding process to reduce its bids by substantially lowering and oftentimes eliminating any profit component.

Southwestern did receive construction jobs during the period of Semco's anticompetitive conduct. On these, it sustained injury because the bid was artificially deflated in response to Semco's unlawful advantage, and Southwestern thus lost profits on the jobs it received in the relevant time frame. Not surprisingly, once Southwestern finally obtained parity with Semco in September 1981, its success rate on bids, and consequently its backlog of bids, rose dramatically.

The evidence at trial showed that Southwestern's bids would have been lower than Semco's bids on a number of specific jobs had it not been for the wage discrepancy.

The record includes further evidence of injury in fact by way of expert testimony. An economist prepared an econometric model which established that Semco's unlawfully obtained composite wage rate drastically affected Southwestern's profits.

The jury heard and accepted the foregoing evidence at trial and made its finding that Southwestern had established injury

in fact. Pursuant to the jury verdict, the District Court entered judgment in favor of Southwestern.

The Fifth Circuit Court of Appeals reversed the District Court's judgment and overturned the jury's verdict on the sole ground that Southwestern had failed to sustain its burden of proving injury to its business or property under the antitrust laws. The Court of Appeals' holding ignores the voluminous above-recited evidence that Semco's and Mesa's conspiracy adversely affected Southwestern's bidding success. Further, the holding imposes an artificial standard of proof on a plaintiff in an antitrust case involving bidding. In the Fifth Circuit, such plaintiffs must present evidence in their case-in-chief of third party bidders on specific projects in order to establish injury; and further, such plaintiffs must disprove, or negative, the existence of third party bids on particular jobs that might have been lower than the plaintiff's bids. In short, this extraordinary decision imposes a burden on future antitrust plaintiffs of foreclosing all potential alternative or intervening sources of their injury to establish injury to their business or property under Section 4 of the Clayton Act.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT'S DECISION IGNORES LONG-STANDING SUPREME COURT MANDATES SETTING A PRIVATE ANTITRUST PLAINTIFF'S BURDEN OF PROOF ON FACT OF INJURY.

A. Under Supreme Court precedent evidence establishing with a fair degree of certainty that a defendant's conduct was a material cause of a plaintiff's injury is sufficient proof of injury in fact.

Section 4 of the Clayton Act provides recovery for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . .." 15

U.S.C. § 15(a) (1976). In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), this Court stated the burden of proof of injury required of a private antitrust plaintiff:

> [I]n the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts [have] caused damage to the plaintiffs.'

Zenith, 395 U.S. at 123-24, *quoting Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264 (1946). This Court reaffirmed in *Zenith* its longstanding precedent which recognizes the difficulties inherent to proving injury in fact, and a coincident causal nexus, and which therefore sets an alleviated injury burden on private antitrust plaintiffs. In the case at bar, as in most antitrust cases, the plaintiff cannot prove with precision what would have occurred had the defendants' anticompetitive conduct never existed. Neither can the plaintiff gain unlimited access to the data necessary to establish perfect causation. To prove causation more securely would require information from competitors and from an analysis of a variety of economic phenomena which are not susceptible of concrete proof.

This Court recently explained the rationale for the alleviated burden of proof on the private antitrust plaintiff. In *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), the Court reaffirmed its

> willingness to accept a degree of uncertainty in these cases [which] rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what

> plaintiff's situation would have been in the absence of the defendant's antitrust violation. But our willingness also rests on the principle . . . that it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.

Truett, 451 U.S. at 566-67 (quoting *Hetzel v. Baltimore & Ohio Railroad Co.*, 169 U.S. 26, 39 (1898), and citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931)).

B. Southwestern's trial evidence of injury fully met the Supreme Court standards of proof on an antitrust plaintiff.

As stated above, Southwestern's fact of injury was revealed by the variety of adverse consequences it suffered in 1981, both internally and in the marketplace. The Supreme Court's own decisions finding injury to antitrust plaintiffs establish the sufficiency of this evidence.

In *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), the petitioner alleged injury from a competitor's attempts to preclude its entry into the pertinent market. The competitor respondents in that case had engaged in anticompetitive activities, including a price-cutting conspiracy, intended to exclude the petitioner from the marketplace. The appellate court had reversed a jury verdict for the petitioner on the ground that the petitioner had failed to prove that it would not have sustained losses in the absence of respondent's behavior, and concluded that the adverse impact on petitioner's business was the inevitable result of poor management and lack of sufficient capital. In reinstating the jury verdict, this Court admonished the court of appeals for improperly making factual assumptions contrary to the jury's finding:

> The court [of appeals] therefore concluded that petitioner had not sustained the burden of proving that the depreciation in value of its plant was due in any measurable degree to any violation of the Sherman Act by respondents. But this conclusion rested upon inferences from facts within the exclusive province of the jury.

Story Parchment, 282 U.S. at 566.

The opinion below is virtually indistinguishable in its substitution of judicial inferences for the jury's verdict. Southwestern offered evidence of Semco's wrongful conduct, a simultaneous loss of business, and declining profit values of exactly the type Semco's breach was likely to cause. The record evidence supports inferences that Southwestern would have won specific projects absent Semco's bidding advantage; that Southwestern received less profit because Semco's behavior compelled it to slash its bids to compete with Semco; and that Southwestern lost substantial business through the duration of Semco's exclusive wage agreement.

With its rejection of the jury's fact finding, the Fifth Circuit necessarily elevated this Court's formulation of the antitrust plaintiff's burden of proof by requiring Southwestern to foreclose alternative sources of its damage.

Two Supreme Court decisions since *Zenith* have addressed the fact of injury issue and demonstrate the impropriety of the Fifth Circuit's decision. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court established that recovery under Section 4 of the Clayton Act will obtain where plaintiff establishes injury of the type that the antitrust laws were intended to forestall. Semco's unlawful advantage in wages was coupled with an agreement to place Southwestern at a competitive disadvantage. Semco used the exclusive bidding advantage it secured to undercut its competitor, Southwestern, and to eliminate meaningful competition among the two com-

petitors in securing construction projects. As the *Story Parchment* decision mandates, this type of behavior is within the intended proscription of the antitrust laws.

In *Associated General Contractors of California, Inc. v. California State Council*, 459 U.S. 519 (1983), this Court set forth a number of factors to be considered in determining whether a private antitrust plaintiff has established injury. These criteria are as follows:

1) Whether the injury is of a type that the antitrust laws were intended to forestall;
2) Whether the injury is direct, i.e., whether the plaintiff is a consumer or competitor in the relevant marketplace;
3) Whether an identifiable class of persons other than plaintiff exist which are more appropriate parties;
4) Whether apportionment of damages is too speculative or complex to support an award.

Associated General Contractors, 459 U.S. at 537-46.

Southwestern has met the burden of proof pertaining to each of these factors. First, Semco's unlawful predatory behavior, which targeted and intended to impair the business of its only competitor in the Local's jurisdiction, produced an injury of exactly the type the antitrust laws were intended to forestall. *See Story Parchment*, 282 U.S. at 566. Second, Semco's unlawful agreement eliminating meaningful competition intentionally caused injury in fact to Southwestern, not only as Semco's direct competitor in the national marketplace, but as the only other spiral pipe and fittings manufacturer within the Local's jurisdiction. Indeed, there could be no class of potential plaintiffs more likely to act or more directly harmed by Semco's conduct.

Finally, Southwestern's evidence on fact of injury was unusually extensive relative to most antitrust cases. It illustrated injury in fact through both direct evidence and expert testimony. Southwestern offered an econometric model which evalu-

ated the impact of the conspiracy on Southwestern's business by eliminating from Semco's bids the value of the unlawful labor advantage. Southwestern's other evidence, referenced above, showed a tremendous and diverse impact to its profit margins on all bidding, to bidding opportunities, and to its bidding successes, when Semco bid using the secret union wage advantage. Conclusive evidence in the record showed specific construction projects for which both Southwestern and Semco bid, and showed that Southwestern's bids would have been lower than Semco's bids absent the latter's wage advantage. The record did not contain evidence that third parties would successfully have underbid Southwestern on all of these projects.

In short, Southwestern produced evidence more than sufficient to satisfy this Court's formulation of the private antitrust plaintiff's burden of injury proof.

C. The Fifth Circuit has ignored Supreme Court precedent in requiring Southwestern to foreclose alternative or intervening sources of its injury.

In overturning the district court's judgment and the jury's verdict in the instant case, the Fifth Circuit has ignored the longstanding body of Supreme Court precedent cited above, has misinterpreted the evidence adduced in the instant case, and has substituted its own factual inferences for that of the jury.

The Fifth Circuit reached its result by holding that a bidder who alleges antitrust violations must establish affirmatively, that is to an absolute certainty, that no other bidder could have received a specific bid as a predicate to recovery under Section 4. Without contradictory evidence from Semco, Southwestern's record did show specific construction contracts on which its bids were lower than Semco's, absent Semco's exclusive bidding advantage. The jury could and did reasonably infer that on competitive jobs, either (i) there were only two bidders

or (ii) only Southwestern's and Semco's bids were material to the award. Both inferences are permissible and each independently would support the finding that Southwestern's lower bid would have succeeded in the absence of the Defendants' wrongful conduct.

The jury's inferences are particularly reasonable in light of the entire record. Semco knew that courts theretofore had placed upon it, as defendant, the burden of disproving or rebutting Southwestern's evidence of causation. On certain projects, Semco attempted to suggest that third parties would have bid lower than Southwestern. It did not, however, convince the jury that such evidence applied to all affected projects, or that Southwestern would not have been the lowest bidder on each project. Therefore, if the jury is permitted to make reasonable inferences from the evidence submitted at trial, Southwestern satisfies even the outrageous burden advanced in the Fifth Circuit.

The Fifth Circuit's formulation of the injury requirement elevates a plaintiff's burden of proof far beyond that which the Supreme Court has formerly permitted. This Court's decisions are consistent in holding that a plaintiff who shows (as Southwestern has) that it sustained injury of the type likely to be caused by a defendant's anticompetitive behavior, has sustained its evidentiary burden. *See Story Parchment*, 282 U.S. at 561-66; *Zenith*, 395 U.S. at 124. The causal element need not be proved beyond showing its materiality with a fair degree of certainty. *Truett*, 451 U.S. at 566. No Supreme Court opinion has adopted the contrary requirement, now controlling in the Fifth Circuit, that an antitrust plaintiff foreclose other potential causes of its harm to prove injury under Section 4. *See Zenith*, 395 U.S. at 114 n.9.

In delivering its decision, the Fifth Circuit did not challenge the anticompetitive nature of the agreement and Semco's ensuing clandestine conduct. The Fifth Circuit ignored the weight of Southwestern's evidence, instead imposing a burden

of injury proof on Southwestern which goes beyond even that imposed on a personal injury plaintiff. Its decision flies in the face of the Supreme Court's allocation of antitrust evidentiary burdens, first established in *Truett*, that the burden of establishing an alternative cause of a plaintiff's injury, once a plaintiff has established injury to a fair degree of certainty, rests firmly on the defendant. *E.g.*, *Truett*, 451 U.S. at 566. Nevertheless, the Fifth Circuit has now made such proof part of a Clayton Act Section 4 plaintiff's *prima facie* case.

D. Conclusion.

Southwestern requests that this Court take this opportunity to realign the Fifth Circuit with the Supreme Court as to the allocation and level of proof of injury imposed in a private antitrust action. It is important for future Section 4 enforcement that private antitrust plaintiffs be given notice of their evidentiary burdens. By the decision announced below, a private antitrust plaintiff who reasonably relies on long established Supreme Court precedent may now be left without recompense in the Fifth Circuit, where he is confronted with an elevated burden of proof. In fact, such is exactly the case with Petitioner herein.

II.

CERTIORARI SHOULD BE GRANTED SO THIS COURT CAN FIRMLY SETTLE THE BURDEN OF AN ANTITRUST PLAINTIFF'S PROOF OF INJURY, WHICH IS CURRENTLY SUBJECT TO CONFLICTING INTERPRETATIONS AMONG THE CIRCUITS.

A. Certain lower courts have disregarded this Court's instructions on placement and level of proof of injury under Clayton Act Section 4.

In recent years a minority of the circuit courts has announced progressively escalating burdens of proof applicable

to a private antitrust claim. The Fifth Circuit signals in this case its location at the front of an increasingly strident movement to constrict the scope of private antitrust claims by elevating the plaintiff's burden of proof. Yet as this Court has recognized, the consequences of such developments are clear: elevation of an antitrust plaintiff's burden of proof results in a vast reduction in the number of plaintiffs able to establish a claim. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981).

The proof restrictions imposed by a minority of the circuit courts are particularly disruptive and discouraging to the justified antitrust complainant. These decisions ignore the inherent ambiguities of identifying the source of one's business injury. Natural fluctuations in the marketplace, or a plethora of other unidentifiable potential sources, could effect business damage. The existence of such possible causative factors is the very reason this Court requires an alleviated burden of proving fact of injury to sustain the essential effectiveness of the private action in enforcing the antitrust laws. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969).

The Supreme Court requirement that Southwestern show a causal nexus between the conduct of Semco and the Local's agent, and Southwestern's injury is a standard of proof Southwestern has satisfied. Its evidentiary burden of proving the fact of damage under Section 4 of the Clayton Act

> . . . is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4.

Zenith, 395 U.S. at 114 n.9. (emphasis original) (citations omitted).

B. The clear majority of circuits apply the alleviated burden of injury proof provided in *Zenith* and its progeny.

Most of the circuit courts have remained firm in applying Supreme Court injury standards to antitrust cases. *See e.g., Danny Kresky Enterprises Corp. v. Magid*, 716 F.2d 206, 209-10 (3d Cir. 1983); *Pierce v. Ramsey Winch Co.*, 753 F.2d 416 (8th Cir. 1985); *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467 (10th Cir.), *cert. denied*, 106 S.Ct. 77 (1985).

The Eleventh Circuit recently rendered a decision which illustrates the circuit majority's adherence to Supreme Court precedent. In *National Independent Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602 (11th Cir. 1984), *cert. denied*, 106 S.Ct. 544 (1985), the plaintiff association of motion picture exhibitors sued eight major motion picture distributors under Section 4 of the Clayton Act, citing their attempts to prevent the plaintiff, a potential competitor, from entering the marketplace. In substance, the plaintiff's proof showed that the distributor defendants had interfered with plaintiff's efforts to generate revenues through on-screen advertising, and to enter the motion picture distribution market. The evidence showed that defendants threatened to boycott or otherwise penalize exhibitors who agreed to assist in the plaintiff's revenue-raising effort by penalizing those exhibitors who permitted on-screen advertising in general.

The district court granted summary judgment based on the defense contention that the plaintiff's injury was the result of alternative factors. Plaintiff's evidence showed that the defendants had offered financial incentives to exhibitors who shunned on-screen advertising, but did not show any instance in which the defendants had contacted an advertiser or discouraged an advertiser or exhibitor from on-screen advertising specifically related to plaintiff's efforts. Although the plaintiff did not specifically link its inability to enter the marketplace to defendant's unlawful conduct, the Eleventh Circuit followed *Zenith*

in reversing summary judgment. Its rationale is straightforward:

> [T]he law does not require an antitrust plaintiff to show that the defendant's wrongful action was the *sole* proximate cause of the injury sustained. The plaintiff need only prove, with a fair degree of certainty, that defendant's illegal conduct *materially contributed* to the injury.

National Independent Theatre, 748 F.2d at 607 (emphasis original) (citations omitted).

The Fifth Circuit's decision announced in this case is flatly inconsistent with the Eleventh Circuit's holding in *National Independent Theatre*. Southwestern's evidentiary support substantially exceeded that of the plaintiff in *National Independent Theatre* through Southwestern's proof of the impact of Semco's conduct on its business, profit margins, in-house bid orders and ability to compete effectively. Nevertheless, the Fifth Circuit held that record insufficient for not disproving other causes of lost bids.

The majority of the circuit courts are consistent with the Eleventh Circuit, and not the Fifth Circuit, in that they follow the Supreme Court's mandate of an alleviated antitrust burden of proof. The majority and Supreme Court view, moreover, mirror the traditional placement of the burden of proving that alternative causes contributed, in whole or in part, to a plaintiff's damage. This burden rests firmly with the defendants. *See e.g., Truett*, 451 U.S. at 566-67; *Klinger v. Baltimore & Ohio Railroad Co.*, 432 F.2d 506 (2d Cir. 1970); *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*, 458 F.Supp. 423 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. International Business Machines Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981). As stated above, the Supreme Court has recognized the vagaries of the marketplace and the ambiguities involved in proving causation with certainty. Therefore, once a plaintiff has established causal mis-

conduct, the defendant must carry the burden of proving that its wrongful activity did not cause the plaintiff's injury. *Truett*, 451 U.S. at 566-67.

C. The Ninth and Sixth Circuits, and assorted lower courts, have dramatically elevated and misallocated the private antitrust burden of injury proof.

In the late seventies the Sixth and Ninth Circuits rendered decisions that elevate the private antitrust plaintiff's burden of injury proof beyond the level set by the Supreme Court. In addition, scattered district courts have adopted other higher proof standards, reflecting increasing confusion among the courts.

In *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) and 469 U.S. 1190 (1985), the Ninth Circuit adopted a stringent causation requirement for private antitrust plaintiffs. Under a misconception of *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Ninth Circuit introduced a new unrelated rule:

> According to *Brunswick*, plaintiff must show more than that it suffered injury causally linked to the antitrust violation; the injury must be shown to have 'flowed' from the wrong. To 'flow' from the wrong, *Brunswick* suggests, the loss must be 'the type of loss that the claimed violations . . . would be likely to cause'. (citation omitted). *To be one of several causes is not enough.*

Handgards, 601 F.2d at 997 (emphasis added).

Justice Kennedy, in his concurring opinion in *Handgards*, recognized that "[to] the extent this language suggests a change in the normal standards regarding causation in antitrust cases, the statement is unexplained. There is no need in this case to reexamine the rule that 'proximate cause' in antitrust cases is defined in terms of 'a substantial cause.'"

Handgards, 601 F.2d at 999 (Kennedy concurring). The decision ignored Supreme Court precedent, which does not require *plaintiffs* to weigh the relative contributions of various potential causes. *See Zenith*, 395 U.S. at 123-24. Plaintiffs must establish the causal link, but they need not negate or discount other causes. *Truett*, 451 U.S. at 566. Once a causal connection has been established, plaintiff has met its burden. *Bigelow v. R.K.O. Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931); *Anderson Foreign Motors, Inc. v. New England Toyota Distributor, Inc.*, 475 F. Supp. 973 (D. Mass. 1979).

One other circuit has taken the minority view of the Ninth Circuit as expressed in *Handgards*. In *Shreve Equipment, Inc. v. Clay Equipment Corp.*, 650 F.2d 101 (6th Cir.), *cert. denied*, 454 U.S. 897 (1981), a panel of the Sixth Circuit declared that a plaintiff must not only prove that defendant's conduct was a material cause of its injury, it must prove that other potential causes were *not* the cause of its harm. *Shreve Equipment*, 650 F.2d at 105.

Contradictory circuit decisions have distorted this Court's holdings pronouncing fact of injury standards. A Pennsylvania district court opinion illustrates the resultant confusion. In *R.S.E., Inc. v. Pennsylvania Supply, Inc.*, 523 F. Supp. 954 (M.D. Pa. 1981), a district court placed on the private antitrust plaintiff the burden of showing that its damage did not result from potential alternative factors, such as management problems, recession in the economy or lawful competition. *R.S.E.*, 523 F. Supp. at 964. This rule is a radical departure from prior standards applied in any case, and especially in antitrust cases.

D. The Fifth Circuit has now adopted a burden of injury proof even more repressive than that in the Sixth and Ninth Circuits.

The Fifth Circuit's decision in *Southwestern Sheet Metal Works, Inc. v. Semco Manufacturing, Inc.*, 788 F.2d 1144 (5th Cir. 1985), only increases the current confusion regarding judicial treatment confronting the private antitrust plaintiff. Indeed, the Fifth Circuit has now surpassed even the Ninth and Sixth Circuits in adding unprecedented proof requirements to the plaintiff's *prima facie* case. The Fifth Circuit required Southwestern to disprove alternative causes, to-wit, third party bids on specific bidding jobs. Although Semco and Mesa failed to introduce evidence of alternative causation, the Fifth Circuit Court of Appeals required Southwestern to prove in its case-in-chief that the defendants' unlawful conduct was the sole proximate cause of its injury. The requirement thus imposed further augments the inconsistency among the circuits in Section 4 cases.

The case now before the Court affords an opportunity to firmly settle this incoherency regarding "antitrust injury." Although this Court has recognized the difficulties of promulgating universal rules to govern Section 4 cases, *Associated General Contractors of California, Inc. v. California State Council*, 459 U.S. 519 (1983), lower courts have imposed just such benchmarks. Furthermore, they have set them at a level which is well nigh unattainable for an antitrust plaintiff. It is imperative that a private antitrust plaintiff have notice of the nature and level of proof he must proffer to support a jury finding of fact of injury. Currently, a plaintiff who reasonably relies on Supreme Court precedent, and consistent reiterations of that precedent, may nevertheless be doomed in any given circuit by an *ex post facto* elevation of his evidentiary burdens.

Bigelow and *Zenith* set the standard of proving material causation with a fair degree of certainty. Their holdings have never required antitrust plaintiffs to negate alternative or intervening potential causes. In the guise of imposing a "sub-

stantiality" requirement under the standard, the Ninth and Sixth Circuits have held that plaintiffs must weigh the relative merits of the various possible causes. *Handgards*, 601 F.2d at 997; *Shreve*, 650 F.2d at 105. The Fifth Circuit has now moved beyond even these courts, through its treatment of Southwestern's evidence, to require the plaintiff's foreclosure of all possible intervening causes of its injury.

The decision in the instant case underscores the dangers of continued inroads into the fora available to private attorneys general for enforcement of the antitrust laws. Such developments threaten to render private enforcement of the antitrust laws wholly ineffective.

E. Conclusion.

The pivotal inquiry in current private antitrust cases is the weight and allocation of burden of injury proof. Until recently, courts universally required a plaintiff to offer some evidence of causative injury in fact; the burden of disproving causation, or of proving a supervening causative factor, lay squarely with antitrust defendants. However, several circuits now adopt the view that a Section 4 plaintiff must bear the burden of disproving potential alternative, or intervening, sources of its injury to get to the jury. Inevitably, where summary judgment or review of a jury verdict is involved, the plaintiff that must foreclose alternative elements of causation loses.

The Fifth Circuit has misconstrued the antitrust plaintiff's burden of proof in two important respects. First, it requires a plaintiff to show more than the causal connection the Supreme Court has previously endorsed. Indeed, the circuit now requires a complete foreclosure of potential alternative sources of a Section 4 plaintiff's injury. Second, it misallocates the burden of proving alternative causation, placing it on the plaintiff rather than on the defendants.

The narrow issue presented herein affords the Court an opportunity to delineate and allocate the burden of proof as it deems proper. Southwestern urges this Court to settle this continuingly problematic rule so future antitrust plaintiffs may properly evaluate their claims.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT'S HOLDING THREATENS TO EVISCERATE PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS.

A. This Court has recognized the difficulties of proving causation with complete certainty, and has set the plaintiff's burden of injury proof under Section 4 accordingly.

This Court has long recognized the importance of the private plaintiff in the effective enforcement of the antitrust laws. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), *overr. on other grounds, Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969). In addition, this Court has often warned that too stringent a burden would pose particular problems that might eliminate private enforcement of the antitrust laws. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981). Consequently, this Court has consistently applied a rule that requires a private antitrust plaintiff to show evidence that illustrates causation only with a fair degree of certainty to support a just and reasonable inference of damage. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969). The reasoning for this rule is sound:

> Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the

> measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 264-65 (1946). The proof requirement set by the Fifth Circuit has conferred exactly this advantage on defendants.

B. The current developments in the Fifth Circuit threaten to leave the antitrust plaintiff without recourse.

Especially in the Fifth Circuit, there is nowhere for the private antitrust plaintiff to turn. In the case at bar, Southwestern offered evidence by way of expert testimony, through an econometric model that measured the impact of Semco's unlawfully secured advantage on Southwestern's profits. The Fifth Circuit itself previously sanctioned this approach in *H&B Equipment Co. v. International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978):

> In the market preclusion context, to show causation a plaintiff must provide *some evidence it could have served the market absent the defendant's wrongful acts. The plaintiff need not document each sale lost.* It can, for example, rely on expert testimony concerning its ability to penetrate the market and to succeed in competition with those already there.

H&B Equipment, 577 F.2d at 247 (emphasis added).

Similarly, in the instant case, Southwestern offered evidence through the use of expert analysis showing that it would have been able, absent the Defendants' wrongful conduct, to secure construction projects, and therefore profits, over an expansive period of time. Notwithstanding Southwestern's reliance upon a method of proof previously applauded in the Fifth Circuit, the Circuit now holds that such a plaintiff must rely on a specific lost sale (or bid).

C. Once a plaintiff has shown a causal nexus between a defendant's conduct and the alleged injury, the burden of proving alternative causes or of disproving the causal relationship to the plaintiff should remain on the defendant.

Southwestern requests that the Court take the opportunity afforded by the facts of this case to reaffirm its prior holdings regarding a private antitrust plaintiff's burden of injury proof and in doing so to end the confusion demonstrated above among the circuit courts regarding these burdens. The Court has consistently held that a plaintiff must come forward with sufficient evidentiary support to permit an inference that the defendant's wrongful conduct was the cause of the plaintiff's injury. *Zenith*, 395 U.S. at 114 n.9. Traditionally, evidence that plaintiff suffered injury likely to be caused by defendant's conduct or that defendant's conduct was a material cause of a plaintiff's injury was sufficient. *Bigelow*, 327 U.S. at 264. Now, however, in at least three circuits, a plaintiff must prove not only that defendant's conduct was a cause of his injury, he must foreclose other possible causes of his injury.

Under the Fifth Circuit's holding very few plaintiffs will be able to shoulder the newly created burden of proving a negative proposition: that no other sources of its damage exist. Southwestern, if forced to reconstruct the bidding on construction jobs during the period of Semco's anticompetitive conduct, would either have to approach each solicitor of bids individually, or reconstruct records by securing information on bidding from competitors. Either approach sets an onerous and unprecedented task, offering results too uncertain to impose uniformly on antitrust plaintiffs. As in the typical antitrust case, proof of perfect causation involves market inquiries and economic analyses which are not susceptible of concrete determination.

Traditionally the antitrust plaintiff is subject to a lesser burden of proof than other claimants to account for the marketplace influences which render certainty a virtual impossibility.[1] Hence, to require the antitrust plaintiff to foreclose possible sources of causation may actually result in eliminating his cause of action in the most clearly violative circumstances. The more complicated and clandestine the defendant's conduct, the more likely the plaintiff will be unable to access information sufficient to sustain such a burden of proof.

D. Conclusion.

To elevate a plaintiff's burden of proof beyond establishing the causal nexus this Court has formerly required threatens to gradually but firmly reduce and finally eliminate the private cause of action in a large number of antitrust cases. Therefore, Southwestern requests that this Court now clarify a private antitrust plaintiff's burden of injury proof so future plaintiffs may know their burdens and may sustain them where justified.

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[1]The common law rule in tort cases, for example, does not require a plaintiff to pinpoint causation among a forest of potential alternatives. The tort plaintiff need not prove that the defendant was the sole cause of his injuries. *In re Air Crash Disaster Near New Orleans, La. on July 19, 1982,* 764 F.2d 1084 (5th Cir. 1985); *Skinner v. Stone, Raskin & Israel,* 724 F.2d 264 (2d Cir. 1983) (where several proximate causes exist injury in fact may be attributed to any one). Products liability cases are a useful analogy to the antitrust genre, because both actions require alleviated proof standards to sustain effective enforcement. In such cases, a plaintiff must establish a clear causal nexus between its harm and defendant's conduct, but the burden of proving that injury is attributable to alternative causes rests on defendants, for their wrong has created the problematic uncertainty. *Coursen v. A. H. Robins Co.,* 764 F.2d 1329, 1338 (9th Cir.), *corrected,* 773 F.2d 1049 (9th Cir. 1985); *Sindell v. Abbott Laboratories,* 607 P.2d 924 (Cal.), *cert. denied,* 449 U.S. 912 (1980).

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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